Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLE

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1379.

EDMUND J. GODIN,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Respondent is not dissatisfied with petitioner's citation of the opinion below or his statement of jurisdiction.

Questions Presented.

1. Whether the Massachusetts Supreme Judicial Court enunciated a new doctrine when it rejected the petitioner's claim that the common law exception to tort liability known as "contractual assumption of the risk" applies to criminal prosecutions.

2. Whether, if so, the new doctrine was so unforeseeable as to deprive employers of fair warning that recklessly killing their employees constitutes a crime.

3. Whether, if so, the petitioner has standing to challenge this new doctrine.

4. Whether there was sufficient evidence of reckless conduct by the petitioner to withstand constitutional challenge.

Reasons for Denying the Writ.

I. The Claim of Lack of Notice does Not Merit the Attention of This Court.

The petitioner was convicted of three counts of involuntary manslaughter following a devastating explosion at a fireworks factory which he controlled. He does not question the well-established Massachusetts rule that reckless or wanton conduct will support a manslaughter conviction, but says that this rule does not apply to him because the decedents were employees of his corporation. The Supreme Judicial Court opinion rejecting this argument he characterizes as "a retroactive and unforeseeable application of the criminal law" (Pet. for Cert., p. 2). This characterization is inaccurate.

There is no case in Massachusetts holding that the common law tort doctrine known as "contractual assumption of the risk" is applicable to criminal cases. So far as the respondent is aware, there is no decision anywhere so holding. Consequently, the Supreme Judicial Court rejected the petitioner's argument and held that Massachusetts had never engrafted this tort-law exception upon the general law of manslaughter:

> "To accept the defendant's arguments here is not only to overlook the fundamentally different purposes of criminal law and tort law but to create a class of persons — employees — as to whom a license to kill by wanton and reckless conduct is given. No such right has ever existed, nor do we accept such a view now." (Pet. for Cert., p. 16a.)

Thus, the general rule applicable to all persons applies equally to the petitioner. Reckless or wanton conduct which causes death constitutes manslaughter. This ancient and universal rule provided the petitioner with fair notice by which his conduct might be governed. Nevertheless, he says that he was justified in disregarding this notice by a remark made in a footnote in a landmark Massachusetts case. In *Commonwealth* v. *Welansky*, 316 Mass. 383 (1944), the court reviewed manslaughter convictions arising out of the infamous Cocoanut Grove nightclub fire. At page 397, the court noted:

> "Usually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another. But where, as in the present

> case, there is a duty of care for the safety of business visitors invited to premises which the defendant controls,* wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences to them or of their right to care."

At the point marked with the asterisk, the court appended the footnote cited by the petitioner:

> "Compare the case of an employer who at common law owes no duty to his employees to make his factory safer than it appeared to be when the employment began, because they contractually assume the risk. [Citations omitted.] In those cases recovery by a servant against his master for injury caused by fire in a factory was denied. [Citations omitted.] In *Cloutier* v. *Oakland Park Amusement Co.*, 129 Maine, 454, the court failed to distinguish between such cases and the case of an invited business visitor." 316 Mass. at 397 n. 2.

The Supreme Judicial Court might have disposed of the petitioner's contention in a number of ways. First, it might have noted that the *Welansky* footnote applied only to omissions to act, since the court had disposed of affirmative acts in the preceding sentence. This would eliminate any problem, since the conduct charged to the petitioner consisted of affirmative acts — in particular, of storing 16,000 pounds of explosive fireworks in a dangerous manner.

Secondly, the court might have observed that the petitioner was not the decedents' employer. He was the president of the corporation that employed them, but there

is no question that a fellow employee of a business entity can be charged with manslaughter. See *Regina* v. *Haines*, 2 Car. & Kir. 368 (Worc. Ass. 1847).

The court chose, however, to face the petitioner's argument squarely and to declare that the proposition that he advanced has never been the law of Massachusetts. In doing so, it observed that the *Welansky* footnote is clearly dictum. The footnote is unnecessary to a decision of the question then before the court, and is introduced by language which belies the creation of a binding precedent. The reader is invited to "compare" a rule applicable in another context, but there is no suggestion that this rule is to be made applicable to manslaughter charges. The court's remark cannot be taken to create an unprecedented and logically indefensible exception to the general rule on reckless conduct.

It is the fact that petitioner relies on an exception to the general rule which distinguishes his case from those upon which he relies. In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Douglas* v. *Buder*, 412 U.S. 430 (1973), the lower court had enlarged the impact of a statute and a court order beyond the ordinary meaning of the words used. In the present case, the Supreme Judicial Court has done the exact opposite. It refused to import an extraordinary meaning to ordinary words. The petitioner's ill-founded hope that it would do so does not entitle him to relief.

II. The Sufficiency of the Evidence.

The question of constitutional sufficiency of the evidence is normally best left to the lower courts. If the petitioner believes that there was a failure of evidence in a constitu-

tional sense, he should present his claim to a federal habeas court, which would be better able to review the evidence and evaluate his claim. For this reason alone, his petition should be denied. It is unlikely that any question of national significance will be answered by reviewing the evidence in this case.

In any event, there was abundant evidence to meet the constitutional standard. The petitioner ordered that approximately 16,000 pounds of explosives be stored in a building in which little or none was normally stored and in which only much smaller amounts were normally kept while undergoing processing. He ordered that several employees work in this building, although he had been warned of the danger of doing so. There was expert testimony that the excess quantity of fireworks not only increased the risk of explosion, but also increased the severity of any explosion which might occur. The actual explosion was devastating; it destroyed not only the building in which the excessive storage took place, but also other nearby buildings and vehicles in which fireworks were stored. All of the employees working in the building in which the extensive storage took place were able to get out, but three of them were killed by explosions and fire before they could reach safety. There is no occasion for the Court to review this evidence.

Conclusion.

The petition should be denied.

Respectfully submitted,

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